

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

NILSON HERNEY VALENCIA-
RIASCOS,

Defendant.

NO: CR-10-6095-RMP

ORDER DENYING MOTION FOR
ACQUITTAL

This matter is before the Court on Defendant's "Motion for Rule 29 Judgment of Acquittal or in the Alternative for New Trial," ECF No. 83.¹ The Court held a hearing on Defendant's Motion on August 24, 2011, in Richland, Washington. Defendant Nilson Herney Valencia-Riascos, who is in custody, was

¹ In addition to the present motion for a judgment of acquittal, the Defendant also moved for acquittal at the close of the Government's case at trial and renewed the motion prior to closing arguments. The Court denied both motions.

1 present and represented by Assistant Federal Defender Alex B. Hernandez, III, and
2 assisted by Court-appointed interpreter Bea Rump. Assistant United States
3 Attorney Shawn N. Anderson appeared on behalf of the Government. The Court
4 has reviewed the motion, ECF No. 83, the parties' submissions related to the
5 motion, ECF Nos. 84 and 86, and the remaining file and is fully informed in the
6 matter.

7 **Background**

8 On December 7, 2010, Mr. Valencia-Riascos was indicted by a grand jury
9 on one count of forcibly assaulting a federal officer, United States Immigration
10 Enforcement ("ICE") Agent Shawn Miller, by acts "involving physical contact
11 which inflicted bodily injury" while the Agent was engaged in his official duties,
12 in violation of 18 U.S.C. § 111.

13 The evidence at trial included the testimony of ICE Agent Miller, testimony
14 of a lay witness who was in the room at the time of the assault, testimony of three
15 police officers who were present shortly after the incident, testimony of a police
16 officer who investigated the incident, a video that captured a limited view of the
17 events through the open doorway to the interview room, and the testimony of Mr.
18 Valencia-Riascos. Agent Miller testified that the assault occurred during his efforts
19 to fingerprint Mr. Valencia-Riascos as part of an immigration interview.
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1 In the course of the trial, which began on June 6, 2011, the Government
2 moved for a jury instruction on and a verdict form informing the jury of the lesser
3 included offense of assault on a federal officer by physical contact, without the
4 element of bodily injury. The Court granted the motion and instructed the jury on
5 the charged offense and the lesser included offense. The jury returned a verdict of
6 guilty on the lesser included offense on June 9, 2011.

7 Standards

8 In reviewing a motion for judgment of acquittal pursuant to Fed. R. Crim. P.
9 29(c), the Court must determine whether “viewing the evidence in the light most
10 favorable to the government, the jury could reasonably find the defendant guilty
11 beyond a reasonable doubt.” *United States v. Hazeem*, 679 F.2d 770, 772 (9th
12 Cir.), *cert. denied*, 459 U.S. 848, 103 S.Ct. 106, 74 L.Ed.2d 95 (1982); *United*
13 *States v. Nevils*, 598 F.3d 1158, 1161 (9th Cir.2010 (en banc)).²

14 Rule 29, therefore, presents a two-step inquiry. *Nevils*, 568 F.3d at 1164-
15 1165. First, the Court must review the evidence in the light most favorable to the
16 Government. When “faced with a record of historical facts that supports

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1 conflicting inferences” the Court “must presume—even if it does not affirmatively
2 appear in the record—that the trier of fact resolved any such conflicts in favor of
3 the prosecution, and must defer to that resolution.” *Nevils*, 568 F.3d at 1164-1165
4 (quoting *Jackson v. Virginia*, 443 U.S. 307, 326 (1979)). Second, the Court must
5 determine whether “any” rational trier of fact could have found the defendant
6 guilty beyond a reasonable doubt. *Nevils*, 568 F.3d at 1164-1165.

7 Rule 33 of the Federal Rules of Criminal Procedure provides, “Upon the
8 defendant's motion, the court may vacate any judgment and grant a new trial if the
9 interest of justice so requires.” Fed. R. Crim. P. 33(a). “The district court need not
10 view the evidence in the light most favorable to the verdict; it may weigh the
11 evidence and in so doing evaluate for itself the credibility of the witnesses.”
12 *United States v. A. Lanoy Alston, D.M.D., P.C.*, 974 F.2d 1206, 1211 (9th Cir.
13 1992) (quoting *United States v. Lincoln*, 630 F.2d 1313, 1319 (8th Cir.1980)). “If
14 the court concludes that, despite the abstract sufficiency of the evidence to sustain
15 the verdict, the evidence preponderates sufficiently heavily against the verdict that
16 a serious miscarriage of justice may have occurred, it may set aside the verdict,
17 grant a new trial, and submit the issues for determination by another jury.” *Alston*,
18 974 F.2d at 1211-12 (quoting *Lincoln*, 630 F.2d at 1319).

Defendant's Argument

Defendant argues that there was insufficient evidence that Mr. Valencia-Riascos assaulted Agent Miller because the only evidence of assault was Agent Miller's testimony that Mr. Valencia-Riascos, in the course of resisting the agent's efforts to fingerprint him, struck the agent on the arm and in the mouth with "everything he had" when Agent Miller grabbed the Defendant's shirt, causing Agent Miller pain and swelling in his arm.

Analysis

18 U.S.C. § 111 provides:

(a) In general.--Whoever--

(1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any [designated federal officer or employee] while engaged in or on account of the performance of official duties; or

(2) forcibly assaults or intimidates any person who formerly served as [designated federal officer or employee] on account of the performance of official duties during such person's term of service,

shall, where the acts in violation of this section constitute only simple assault, be fined under this title or imprisoned not more than one year, or both, and where such acts involve physical contact with the victim of that assault or the intent to commit another felony, be fined under this title or imprisoned not more than 8 years, or both.

(b) Enhanced penalty.—Whoever, in the commission of any acts described in subsection (a) . . . inflicts bodily injury, shall be fined under this title or imprisoned not more than 20 years, or both.

1 Section 111 creates three distinct offenses, with subsection (a) containing a
2 misdemeanor and a felony punishable by up to 8 years and subsection (b)
3 containing an additional felony, punishable by up to 20 years. *United States v.*
4 *Vela*, 624 F.3d 1148, 1159 (9th Cir. 2010); *United States v. Chapman*, 528 F.3d
5 1215, 1218 (9th Cir. 2008); accord *United States v. Stoddard*, No. 10-10124, 407
6 Fed. Appx. 231, *1 (9th Cir. Jan. 4, 2011) (also interpreting 18 U.S.C. §111 as
7 amended in 2008 as creating three separate offenses).

8 Mere resistance is insufficient to support a conviction under § 111(a).
9 *Chapman*, 528 F.3d at 1221. There must be an assault, meaning an action that is
10 “either a willful attempt to inflict injury upon the person of another, or . . . a threat
11 to inflict injury upon the person of another which, when coupled with an apparent
12 present ability, causes a reasonable apprehension of immediate bodily harm.”
13 *Chapman*, 528 F.3d at 1219-20 (quoting *United States v. Dupree*, 544 F.2d 1050,
14 1051 (9th Cir. 1976)).

15 Therefore, to convict Defendant of the felony under §111(a), the
16 Government must have proven beyond a reasonable doubt that: (1) on or about
17 November 8, 2010, Agent Miller was an officer or employee of the United States;
18 (2) Mr. Valencia-Riascos forcibly assaulted Agent Miller; (3) Mr. Valencia-
19 Riascos did so while Agent Miller was engaged in, or on account of, his official
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1 duties; and (4) the assault involved physical contact. *See* Model Crim. Jury Instr.
2 9th Cir. 8.3 (2010); *see also* 2 Fed. Jury Prac. & Instr. §24.06 (5th Ed.).

3 The Defendant emphasizes that the police officers who observed Agent
4 Miller immediately following the incident did not see any indications of injury to
5 his arm or mouth, and there is nothing visible in the video to indicate that Mr.
6 Valencia-Riascos struck Agent Miller in the arm and mouth, as Agent Miller
7 testified. Defendant also emphasizes that the lay witness, a jail trustee who was
8 serving as an interpreter at the request of Agent Miller, testified that he did not see
9 the Defendant strike the agent, and that the available portions of the video do
10 not show the Defendant striking Agent Miller at the exact same time that Agent
11 Miller grabbed the Defendant's shirt. The Defendant testified and contradicted
12 Agent Miller's testimony of the event.

13 In reviewing the evidence in the light most favorable to the Government, the
14 Court finds that a reasonable juror could have found Agent Miller to be credible
15 and relied on Agent Miller's testimony that the Defendant struck the agent as
16 sufficient evidence to find beyond a reasonable doubt that the Defendant was
17 guilty of the felony, which does not involve bodily injury but only physical
18 contact.

19 The Court, therefore, denies the Defendant's motion with respect to the
20 motion for acquittal. *See United States v. Rojas*, 554 F.2d 938, 943 (9th Cir.1977)

1 (stating that, “[i]n ruling on a Rule 29(c) motion, a district court must bear in mind
2 that ‘it is the exclusive function of the jury to determine the credibility of
3 witnesses, resolve evidentiary conflicts, and draw reasonable inferences from
4 proven facts’”(internal citation omitted)).

5 As for Defendant’s motion for a new trial, the majority of the evidence was
6 neutral as to whether Defendant intentionally assaulted Agent Miller in a way that
7 involved physical contact. The video does not show what occurred once the agent
8 and Defendant move away from the doorway in the investigation room. The
9 testimony of the lay witness, who was an inmate serving as a trustee and translator,
10 was inconsistent and not credible. *See Alston*, 974 F.2d at 1211 (noting that a court
11 may weigh the evidence for purposes of analyzing a Fed. R. Crim. P. 33 motion).

12 Again, this matter centers on whether one believes Agent Miller’s testimony
13 that the Defendant struck him, or the Defendant’s testimony that he did not strike
14 Agent Miller. The jury could have reasonably concluded that Agent Miller was
15 credible and that the Defendant was not credible. The jury could reasonably find
16 that the agent's reference to the assault occurring at the time that the agent grabbed
17 the Defendant's shirt as meaning a beginning point of a chain of events rather than
18 as the exact same second that the agent grabbed the shirt, as Defendant now
19 argues. The fact that the jury apparently found Agent Miller credible and the
20 timing of the Defendant's assault believable does not weigh sufficiently heavily to

1 persuade the Court that a serious miscarriage of justice may have occurred.

2 Therefore, the Court denies Defendant's motion for a new trial.

3 **Accordingly, IT IS ORDERED** that Defendant's motion for judgment of
4 acquittal or, in the alternative, for a new trial, **ECF No. 83**, is **DENIED**.

5 **IT IS SO ORDERED.** The Clerk is hereby directed to enter this Order and
6 provide copies to counsel and to the United States Probation Office.

7 **DATED** this 29th day of August, 2011.

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9 *s/ Rosanna Malouf Peterson*
10 ROSANNA MALOUF PETERSON
11 Chief United States District Court Judge
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